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No. 569

In the Supreme Court of the United States

OCTOBER TERM, 1942

FRANK TOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 93) is not yet reported. The opinion of the district court overruling the demurrer to the indictment (R. 64) is reported at 36 F. Supp. 273, and its opinion overruling petitioner's motions to direct a verdict and to set aside the verdict (R. 67) is reported at 42 F. Supp. 252.

JURISDICTION

The judgment of the circuit court of appeals was entered October 28, 1942 (R. 93). The petition for a writ of certiorari was filed December 5,

1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the pistol introduced in evidence against the petitioner was seized in violation of the Fourth and Fifth Amendments.

2. Whether it was error for the circuit court of appeals to construe Section 1 (3) of the Federal Firearms Act in the light of its legislative history.

3. Whether the Federal Firearms Act violates the Second Amendment.

4. Whether the statutory presumption provided in Section 2 (f) of the act is constitutional.

5. Whether the presumption disappears the instant that some contrary evidence is put in.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Second, Fourth, and Fifth Amendments to the Constitution and the relevant sections of the Federal Firearms Act, 52 Stat. 1250, 15 U. S. C. 901–909, are set out in the Appendix, *infra*, pp. 15, 16.

STATEMENT

Petitioner was convicted (R. 54) in the United States District Court for the District of New Jersey under a one-count indictment charging a

violation of Section 2 (f) of the Federal Firearms Act, Appendix, *infra*, p. 16 (R. 3–4); the indictment alleged that petitioner had previously been convicted in the Special Sessions Court of Essex County, New Jersey, for the crime of assault and battery with intent to beat, wound, and ill-treat, and in the Quarter Sessions Court of Essex County, New Jersey, for the crime of breaking and entering at night with intent to steal, and that thereafter he "* * * did knowingly, unlawfully and feloniously receive a certain firearm, to wit, a thirty-two calibre Colt automatic pistol, which said pistol had been shipped and transported in interstate commerce to the said City of Newark from a place to the Grand Jurors unknown" (R. 4). Petitioner was sentenced to two years' imprisonment (R. 3).

The evidence adduced at the trial may be summarized as follows:

On the morning of September 22, 1938, Special Agents Madala, Flynn, Malone, and Dickstein of the Federal Bureau of Investigation, went to the apartment of petitioner and arrested him under a warrant of arrest which charged him with aiding and abetting a theft of cigarettes from interstate commerce (R. 6–7, 10, 12, 33, 34, 93). After arresting petitioner, the agents asked him if he had a pistol, and he answered that he had one in the pocket of a coat hanging in the wardrobe closet of his bedroom. One of the agents

thereupon took possession of the pistol (R. 8, 10, 13–14, 34), and it was introduced in evidence against petitioner at the trial (R. 8).

This pistol was a Colt .32 automatic, bearing serial number 310977 (R. 8–9). There is no muffler or silencer commercially made for this pistol (R. 84, 85, 91); however, the silencer or muffler commercially made for the .25 automatic pistol works satisfactorily with the .32 automatic if certain adjustments are made to it and the silencer (R. 81–83, 85–87, 91). Petitioner's pistol was not adjusted to permit the attachment of a silencer (R. 85–87).

The records of the Colt Patent Firearms Manufacturing Company, Hartford, Connecticut, show that the pistol was shipped from Hartford to Chicago, Illinois, on September 23, 1919 (R. 46). Petitioner testified that he purchased the pistol in New Jersey in 1933 or 1934 (R. 34–35, 39). His wife testified that she had seen it in petitioner's wardrobe at various times during the past five years (R. 40–42), and his sister testified that she had seen it in the same place at various times during the past six years (R. 43–45). However, on cross-examination, both the wife and sister admitted that they were not certain that the pistol which they had seen over the period testified to was the one in question, and admitted that the pistol which they had seen might have been a different one (R. 41, 44–45).

On June 22, 1935, petitioner had been convicted of assault and battery in the Special Sessions Court of Essex County, New Jersey, and on June 15, 1932, he had been convicted in another court of burglary (cf. R. 4 with R. 16–18).

ARGUMENT

I

In contending that his pistol was illegally seized (Pet. 10–11), petitioner assumes that it was seized in the course of a search violative of the Fourth and Fifth Amendments. The evidence does not support his contention.

The evidence concerning the search is found in the testimony of Special Agent Madala (R. 6–16) and in that of petitioner (R. 32–40). From Madala's testimony it appears that he and the other agents, armed with a warrant of arrest (R. 7), went to petitioner's apartment to arrest Lim and to search his premises (R. 12). After petitioner was arrested, he told Madala, in response to a question, that he had a pistol in the pocket of his coat hanging in the bedroom closet (R. 10). The pistol was taken from the coat while petitioner sat on the bed dressing (R. 10, 12, 13). It also appears that a search was made of petitioner's premises after the arrest (R. 7, 12). But at no point in his testimony did Madala make it clear whether the pistol was taken before or after the search of the premises was began (cf. R. 10 with

R. 12, 13), and unless it be considered that the pistol was seized during the course thereof, his testimony contains no details of the search. He did not state the parts of the premises which were searched, the purpose of the search, or what was taken as a result thereof. Petitioner's testimony is even more meager. The sum of it is that after the agents had arrested him in his kitchen they asked him if he had a revolver, and that then, upon his reply that he had one in a suit hanging in his bedroom closet, two of the agents went into the bedroom while the other two covered him with their pistols and kept him in the kitchen (R. 33–34). His testimony is otherwise bare of details of the seizure of the pistol and contains no mention whatever of the search of the premises.

The testimony of these witnesses, it is true, shows that petitioner's pistol was seized and that his apartment was searched. However, it does not follow from this without more that the pistol was seized and the premises searched in violation of his rights under the Fourth and Fifth Amendments. Those amendments do not prohibit all searches and seizures. The presumption that officers, in conformity with their official duties, make seizures and conduct searches in a manner consistent with those Amendments,[1] is, we submit, not here overcome. Particulars of the search and

[1] *Eaker* v. *United States*, 76 F. (2d) 267, 269 (C. C. A. 10); *Donahue* v. *United States*, 56 F. (2d) 94, 97 (C. C. A. 9); *United States* v. *Tatum*, 292 Fed. 497, 499 (N. D. Cal.).

seizure showing that they were unconstitutional must be made to appear in order to overcome the presumption.[2] The evidence in the instant case is devoid of such particulars. There is no testimony to show that the search of petitioner's home was an exploratory ransacking of his papers, records, and effects for evidence of crime in general, as in *United States* v. *Lefkowitz*, 285 U. S. 452, and *Go-Bart Company* v. *United States*, 282 U. S. 344. Neither is there testimony that it was made without an arrest warrant and in the absence of the accused, as in *Taylor* v. *United States*, 286 U. S. 1, *Amos* v. *United States*, 255 U. S. 313, and *Weeks* v. *United States*, 232 U. S. 383; there is testimony to the contrary (R. 7, 10, 13). The search and seizure were not made in premises other than that of the arrest and after the arrest had been made, as in *Agnello* v. *United States*, 269 U. S. 20, nor were they made to seize private papers of the accused, as in *Gouled* v. *United States*, 255 U. S. 298. They were not conducted ostensibly under a state search warrant to seize matter made contraband only by federal law, as in *Byars* v. *United States*, 273 U. S. 28, nor after entrance was gained to the accused's dwelling without a search or arrest warrant and without the consent of the accused, as in *Dukes* v. *United States*, 275 Fed. 142 (C. C. A. 4). In fact, the

[2] *Samson* v. *United States*, 26 F. (2d) 769,770 (C. C. A. 1); *United States* v. *Fitzmaurice*, 45 F. (2d) 133, 135 (C. C. A. 2); *Schnitzer* v. *United States*, 77 F. (2d) 233, 235 (C. C. A. 8).

most that can be gathered from the evidence is that petitioner's pistol was seized and his premises searched. Clearly, therefore, the presumption of the legality of the agents' conduct in seizing the pistol and searching the premises was not overcome by any evidence calculated to prove the search and seizure to be unconstitutional under the rule of the cases cited above and relied upon by petitioner (Pet. 10). Indeed, the evidence warrants the inference that the seizure of the pistol was a legal seizure of an instrument which petitioner could have used to attempt an escape [3] and that the search was a legal search of the place of arrest for the fruits and instrumentalities of the crime [4] for which the arrest was made.[5]

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[3] As an incident of a lawful arrest, officers may search the person of the prisoner and the vicinity of the arrest for instruments with which an escape could be attempted. See *Agnelie* v. *United States*, 269 U. S. 20, 30; *Toliver* v. *State*, 133 Miss. 789, 794–795; *Smith* v. *State*, 52 Okla. Cr. 315, 317; *State* v. *Pinto*, 312 Mo. 99, 107. See also notes, *Right of Search and Seizure Incident to Lawful Arrest, Without a Search Warrant*, 32 A. L. R. 680, 51 A. L. R. 424, 74 A. L. R. 1387, 82 A. L. R. 782.

[4] The warrant of arrest charged petitioner with aiding and abetting a theft of cigarettes (R. 34), commodities easily concealable in a dwelling.

[5] As an incident of a lawful arrest, officers may search the person and vicinity of the arrest for fruits and instrumentalities of the crime for which the arrest was made. See *Agnello* v. *United States*, *supra*, at 30; *Weeks* v. *United States*, 232 U. S. 383, 392; *United States* v. *Kirschenblatt*, 16 F. (2d) 202, 203–204 (C. C. A. 2); *Appell* v. *United States*, 29 F. (2d) 279, 280 (C. C. A. 5); *Shelton* v. *United States*,

Accordingly, certiorari should not be granted on this question.

II

Petitioner contends that the circuit court of appeals erred in resorting to the legislative history of the Federal Firearms Act to determine the meaning of the term "firearm" as defined in Section 1 (3) of the Act (Pet. 11–12); he does not contend that the court's construction of the section is erroneous if resort to the legislative history is proper.

Section 1 (3) defines a "firearm" as "* * * any weapon * * * which is designed to expel a projectile * * * by the action of an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon." Petitioner impliedly argues that this definition describes a firearm as a weapon which expels a projectile through the action of an explosive and a silencer,[6] and that it does not cover his pistol since it was neither equipped with a silencer nor in condition to have one attached at the time it was seized by the agents.[7] He argues further that since the defini-

50 F. (2d) 405, 407 (C. C. A. 7); *Occinto* v. *United States*, 54 F. (2d) 351, 352 (C. C. A. 8).

[6] There is no difference between a "firearm muffler" and a "firearm silencer." See testimony of Baughman (R. 79); The Columbia Encyclopedia, "Silencer," p. 1630; Webster's New International Dictionary (2d ed., 1936), "Muffler," p. 1607.

[7] Petitioner's conclusion is unsound even on his premise. His premise is that the definition of firearm limits that term

tion is plain and unambiguous, it was error for the circuit court of appeals to resort to the legislative history of the section to find a meaning which included his pistol.

Petitioner's construction of the definition is that a "firearm" is an instrument which expels a projectile by action of an explosive and a silencer. This construction is not consistent with the known characteristics of firearms. A firearm expels a projectile, not by the action of the explosive used therein *and* the action of a silencer, but solely through the propulsive action of the explosive, the only purpose and function of a silencer being to lessen the report which follows the shooting of the firearm by retarding the escape of gases released upon the ignition of the explosive.[7] Under petitioner's construction the statute defines a firearm as being something which does not exist. So

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to an instrument which operates through a combination of an explosive and something else. Petitioner assumes that the latter element of the combination can only be a firearm muffler or silencer, but the statute says "and a firearm muffler or firearm silencer, or any part or parts of such weapon." Since a muffler or silencer is not a weapon, the "parts" referred to are those of a weapon "designed to expel a projectile." Thus the pistol here was a "firearm", even if the statute as petitioner contends requires a combination of elements, since it operated by the combined action of an explosive and its own parts.

[7] See testimony of Baughman (R. 79, 80); 15 Encyclopaedia Britannica (14th ed., 1936), "Maxim Silencer," p. 118; The Columbia Encyclopedia, *op cit.*, note 6, *supra;* Webster's New International Dictionary (2d ed., 1936), "Silencer," p. 2336.

construed, the statute cannot accomplish the legislative purpose which plainly appears from the face of the statute, to prohibit fugitives from justice and persons under indictment for crimes of violence, or who have been convicted of such crimes, from shipping, transporting, or receiving in interstate commerce any firearm or ammunition. Petitioner's construction of Section 1 (3) thus renders the statute nugatory and in such circumstances reference may be made to its legislative history,[9] even though it is part of a criminal statute.[10]

Accordingly, certiorari should not be granted on this question.

III

Petitioner further contends (Pet. 13–14) that the Federal Firearms Act violates the Second Amendment. We submit, however, that he has no standing to challenge the Act as in contravention of that Amendment. The Amendment does not confer a right to keep and bear arms; it merely forbids the Congress from infringing any right to bear and keep arms secured to persons by the laws of the State in which they reside. *United States* v. *Cruikshank*, 92 U. S. 542, 553; *Presser* v. *Illinois*, 116 U. S. 252, 265. Petitioner, however, cannot show that the State of

[9] *United States* v. *American Trucking Associations*, 310 U. S. 534, 542–544, 546; *United States* v. *Dickerson*, 310 U. S. 554, 561–562.

[10] *United States* v. *Raynor*, 302 U. S. 540, 543.

New Jersey, in which he has lived since 1921 (R. 33), confers upon him a right to bear and keep a pistol, for the laws of that State make it a crime for a person convicted of burglary to possess such a weapon. N. J. Rev. Stat. (1937), Sec. 2: 176–8. Therefore, he cannot bring himself within the protection of the Second Amendment, and consequently has no standing to argue that the Act contravenes that Amendment. *Hatch* v. *Reardon*, 204 U. S. 152, 160; *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571, 576.

Moreover, as the circuit court of appeals pointed out (R. 99), petitioner failed to show that his pistol was of a type which "has some reasonable relationship to the preservation or efficiency of a well regulated militia" (see *United States* v. *Miller*, 307 U. S. 174, 178). Having failed to show that he is within the possible scope of the Second Amendment, petitioner is not in a position to urge its inconsistency with the statute under which he was convicted.

Finally, as the court below held (R. 100), the right to bear arms by its very nature cannot be absolute. Some limitation on it is inevitable, and the instant statute is a reasonable limitation, well within the perimeter of Congressional power. The decision below is correct and is not in conflict with any other decision interpreting the Second Amendment.

Accordingly, certiorari should not be granted on this question.

IV AND V

We believe, and intend to argue if certiorari is granted, that the circuit court of appeals did not err in holding that the presumption provided in Section 2 (f) of the Act is constitutional and that it remains in the case after the defendant puts in contradicting evidence, subject to the qualification that it must be disregarded by the jury if they find the defendant's evidence credible. However, the court's ruling on the constitutionality of the presumption, while supported by the decision of the First Circuit in *Jose Velazquez* v. *United States*, decided November 27, 1942, is in conflict with the decision of the Sixth Circuit in *William Minski* v. *United States* and *Frank Delia* v. *United States*, both decided in the same opinion on December 2, 1942. The Government intends to file a petition for writs of certiorari in the *Minski* and *Delia* cases, and we are advised that a petition will also be filed by the appellant in the *Velazquez* case. Moreover, we believe that the question whether—and if so, under what circumstances—a statutory presumption is taken from the jury's consideration when the defendant puts in rebutting evidence is in some doubt under the decisions of this Court. Cf. *Western & Atlantic Railroad* v. *Henderson*, 279 U. S. 639, 642–644, *Atlantic Coast Line* v. *Ford*, 287 U. S. 502, 506, and *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 170, 171, with *Hawes* v.

Georgia, 258 U. S. 1, 5, and *Casey* v. *United States*, 276 U. S. 413, 418. We do not, therefore, oppose the instant petition in so far as it seeks review of these two questions.[11]

CONCLUSION

The first three questions raised by petitioner were correctly decided below, there is no conflict of decisions as to them, and they raise no question of general importance. We submit, therefore, that the petition for a writ of certiorari should be denied as to them. However, we do not, for the reasons stated above, oppose the granting of the petition on the two remaining questions.

Respectfully submitted.

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[11] There is a further question presented by the record in this case which the court below did not consider, that is, whether it is a violation of the statute to receive a firearm which has at *any time* been shipped or transported in interstate commerce. The language of the statute is not limited in point of time; it interdicts the receipt of "any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." In the instant case there is un-

APPENDIX

The Second Amendment to the Constitution of the United States provides:

> A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The pertinent part of the Fifth Amendment provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

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controverted evidence that petitioner's pistol was shipped in interstate commerce in 1919 and at some indefinite subsequent date (*supra*, p. 4). Hence, if the statute applies to the receipt of a firearm which had at any time been shipped or transported in interstate or foreign commerce it is unnecessary to rely upon the presumption to establish such transportation. However, since the Government adduced no proof as to the date petitioner received the pistol, reliance must be had upon the presumption insofar as his receipt of the pistol after the effective date of the statute is concerned.

Sections 1 (3), 1 (6), and 2 (f) of the Federal Firearms Act of 1938, 52 Stat. 1250, 15 U. S. C. 901 (3), 901 (6), and 902 (f) provide:

> SEC. 1 (3). The term "firearm" means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon.
>
> * * * * *
>
> SEC. 1 (6). The term "crime of violence" means murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.
>
> * * * * *
>
> SEC. 2 (f). It shall be unlawful for any person who has been convicted of a crime of violence or is a fugutive (*sic*) from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.

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